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Torts--Sovereign Immunity--Municipal Liability

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its effect on, first, subsequent case holdings and, second, subsequent statutes enacted by the legislature. On the broader issue of exclusion, the Court has apparently rejected the New York view as expressed in *Valente*²⁸ by holding that the press, as members of the public, do have an enforceable right to attend court proceedings (or at least public trials). This aspect of the decision could be abused. However, if newspapers do not seek to control the course of court proceedings, but only report what they are entitled to "see, behold, and hear,"²⁹ then the public's right to be in attendance at court proceedings as an interested party will be protected and the public will have gained a needed right in order to promote and preserve proper administration of justice. Concerning the issue regarding publication of the names of juveniles involved in trials, the Court has taken a stand which hopefully will bring about enactment of a statute by the legislature which will serve to protect witnesses and victims from the unnecessary consequences of social degradation.

Julia Johns Kurtz

TORTS—SOVEREIGN IMMUNITY—MUNICIPAL LIABILITY.—In March, 1964, the Ohio River was rising toward flood stage at Louisville. Representatives of the Louisville Seed Company contacted the City of Louisville and received assurances from the flood control department, the mayor and other city officials that gates in the municipal flood wall system would be in place in time to prevent damage to the company's property and merchandise. The flood wall gates were not installed in time and the company's property and inventory were damaged by the resulting flood. The Louisville Seed Co. brought suit against the City of Louisville for damages based on the city's negligence in failing to install the gates. The plaintiff was awarded a judgment on a jury verdict in the amount of \$86,771.43. The City of Louisville appealed. *Held*: Reversed. A municipal corporation may not be held liable in tort for the negligent performance of a function which is inherently part of the carrying on of government and where the performance of this function affects all members of the general public alike. *City of Louisville v. Louisville Seed Company*, 433 S.W.2d 638 (Ky. 1968).

One of the most difficult and confusing problems which the Kentucky Court and other courts throughout the nation have had to face

²⁸ *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954).

²⁹ *LeViness, Crime News*, 66 U.S. L. REV. 370 (1932).

has been the doctrine of municipal immunity from tort liability. It is almost universally recognized that this doctrine had its beginning in the classic English case of *Russell v. The Men of Devon*¹ and was brought to this country by the Massachusetts court in *Mower v. Leicester*.²

The concept of municipal immunity has been one of the most widely debated of legal rules, eliciting more than two hundred law journal articles,³ nearly all of which have been critical of both the

¹ 100 Eng. Rep. 359, 2 T.R. 667 (1788).

² 9 Mass. 247 (1812). The historical basis for the doctrine of municipal immunity was lucidly described in a recent decision by the Minnesota court:

All of the paths leading to the origin of governmental tort immunity converge on *Russell v. Men of Devon*. This product of the English common law was left on our doorstep to become the putative ancestor of a long line of American cases beginning with *Mower v. Leicester*. *Russell* sued all the male inhabitants of the County of Devon for damages occurring to his wagon by reason of a bridge being out of repair. It was apparently undisputed that the county had a duty to maintain such structures. The court held that the action would not lie because: (1) To permit it would lead to 'an infinity of actions,' (2) there was no precedent for attempting such a suit, (3) only the legislature should impose liability of this kind, (4) even if defendants are to be considered a corporation or quasi-corporation there is no fund out of which to satisfy the claim, (6) there is a strong presumption that what has never been done cannot be done, and (7) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is 'that it is better that an individual should sustain an injury than that the public should suffer an inconvenience.' The court concluded that the suit should not be permitted '*because the action must be brought against the public.*' (Italics supplied.) There is no mention of 'the king can do no wrong,' but on the contrary it is suggested that the plaintiff sue the county itself rather than its individual inhabitants. Every reason assigned by the court is born of expedience. The wrong to plaintiff is submerged in the convenience of the public. No moral, ethical, or rational reason for the decision is advanced by the court except the practical problem of assessing damages against individual defendants. The court's invitation to the legislature has a familiar ring. It was finally accepted as to claims against the Crown in 1947, although *Russell* had long since been overruled.

In 1912 when *Mower's* horse was killed by stepping in a hole on the Leicester bridge, counsel argued that 'Men of Devon' did not apply since the town of Leicester was incorporated and had a treasury out of which to satisfy a judgment. The Massachusetts court nevertheless held that the town had no notice of the defect and that quasi-corporations are not liable for such neglect under common law. On the authority of 'Men of Devon' recovery was denied. It was on this shaky foundation that the law of governmental tort immunity was erected. . . . *Spanel v. Mounds View School District*, 264 Minn. 279, 118 N.W.2d 795, 796-97 (1962).

³ See e.g., Alstyne, *Government Tort Liability: A Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963); Antieau, *The Tort Liability of American Municipalities*, 40 Ky. L.J. 131 (1952); Barnett, *The Foundations of the Distinction Between Public & Private Functions*, 16 ORE. L. REV. 250 (1937); Bernstein,

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doctrine itself and of its application.⁴ Treatise writers too have not looked on the doctrine with an especially favorable eye.⁵

Until 1964, Kentucky followed the majority rule⁶ of distinguishing

(Footnote continued from preceding page)

Governmental Tort Liability and Immunity in Wisconsin, 1961 WIS. L. REV. 486 (1961); Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181 (1942); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Price & Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 FLA. L. REV. 330 (1953); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932).

⁴ In beginning his series of articles on sovereign immunity, Prof. Borchard says of the doctrine:

The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that the 'King can do no wrong,' which without sufficient understanding was introduced with the common law into this country, and has survived mainly by reason of its antiquity. The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchical countries of Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule. . . . Borchard, *supra* note 3, at 2.

A widely quoted American Law Reports Annotation condemns the doctrine of municipal immunity as a grossly anachronistic practice:

The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs. Annot., 75 A.L.R. 1196 (1931).

⁵ See generally, 2 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* §§ 11.00-13.05 (1968); 18 E. McQUILLIN, *MUNICIPAL CORPORATIONS* §§ 53.01-53.171 (1963); W. PROSSER, *LAW OF TORTS* § 125 (1964).

⁶ The following is a statement of the almost universally recognized rule: . . . [I]n the absence of statutory provision, there can be no recovery against a municipal corporation for injuries occasioned by its negligence or nonfeasance in the exercise of functions essentially governmental in character. In the exercise of such functions, the municipal corporation is acting for the general public as well as the inhabitants of its territory, and represents in such capacity the sovereignty of the state. No liability attaches to it at common law, either for the nonuse or misuse of such power or for the acts or omissions on the part of its officers or agents through whom such functions are performed, or of servants employed by agencies carrying out governmental functions of the corporation. 38 AM. JUR. *Municipal Corporations* § 572 (1941).

See generally, 38 AM. JUR. *Municipal Corporations* §§ 571-95 (1941).

between governmental and proprietary functions of a municipal corporation and holding it liable in tort for the latter, but immune from tort liability for the former.⁷ In literally hundreds of cases the Court has dealt with this problem and has identified those activities for which a municipal corporation would be held liable⁸ and those for which it would not be held liable.⁹

⁷ The Court has dealt with the governmental-proprietary distinction a number of times. Following is a representative example:

A municipality in the exercise of certain of its corporate powers does perform governmental functions, because such powers are exercised by it for the benefit of the public generally, and in their exercise its representatives and is an arm of the state. For instance, in matters pertaining to the public health and to the maintenance of charitable, penal, reformatory, and similar public institutions it acts in its public capacity because the public generally is vitally interested in such activities. But when the municipality exercises only such powers and privileges as are peculiarly for its own benefit or for the benefit of its own citizens or those of its immediate locality, it is acting in its private or strictly corporate capacity, as distinguished from its capacity as an arm of, and part of, the state.

Lampton & Burke v. Wood, 199 Ky. 250, 253 S.W. 980, 987 (1923).

See also, Smith v. City of Lexington, 307 S.W.2d 568 (Ky. 1957); City of Elizabethtown v. Caswell, 261 S.W.2d 424 (Ky. 1953); O'Connell v. Merchants' & Police Dist. Tel. Co., 167 Ky. 468, 180 S.W. 845 (1915); Twyman's Adm'r v. Board of Councilmen of Frankfort, 117 Ky. 518, 78 S.W. 446 (1904).

⁸ City of Elizabethtown v. Baker, 373 S.W.2d 593 (Ky. 1963), Commonwealth v. General & Excess Ins. Co., 355 S.W.2d 695 (Ky. 1962), City of Bowling Green v. Ford, 263 Ky. 523, 92 S.W.2d 744 (1936), Board of Councilmen of City of Frankfort v. Buttner, 146 Ky. 815, 143 S.W. 410 (1912) (defective streets and sidewalks, provided city has actual or constructive notice); cf. Seay v. City of Louisville, 259 Ky. 64, 82 S.W.2d 212 (1935) (city *not liable* for defects in streets when it annexes a section and leaves streets as they were without undertaking to make improvements), Board of Council of City of Danville v. Fox, 142 Ky. 476, 134 S.W. 883 (1911) (city *not liable* for damages during construction of streets), City of Louisville v. Pirtle, 297 Ky. 553, 180 S.W.2d 303 (1944) (city *not liable* for streets and walks in a public park if they cannot be considered a part of public ways of the city); Madisonville v. Nisbet's Adm'r, 270 Ky. 248, 109 S.W.2d 593 (1937) (distribution of electricity); Flutmus v. City of Newport, 175 Ky. 817, 194 S.W. 1039 (1917) (maintenance of waterworks); cf. Yowell v. Lebanon Waterworks Co., 254 Ky. 345, 71 S.W.2d 658 (1934) (city-owned water company *not liable* for negligent failure to furnish water to extinguish fire); City of Hopkinsville v. Burchett, 254 S.W.2d 333 (Ky. 1953) (operation of a cemetery).

⁹ Gnaul v. Louisville & Jefferson Co. Metrop. Sewer Dist., 346 S.W.2d 754 (Ky. 1961) (construction of sewers); Seay v. City of Louisville, 259 Ky. 64, 82 S.W.2d 212 (1935) (construction of sewers, but city liable for negligent maintenance of sewers after construction completed); Caudill v. Pansion, 233 Ky. 12, 24 S.W.2d 938 (1930), Jolly's Adm'r v. City of Hopkinsville, 89 Ky. 279, 12 S.W. 313 (1889), Pollock's Adm'r v. City of Louisville, 76 Ky. (13 Bush) 221 (1877) (actions of police); Baker v. City of Lexington, 310 S.W.2d 555 (Ky. 1958), V.T.C. Lines v. City of Harlan, 313 S.W.2d 573 (Ky. 1957), City of Louisville v. Pirtle, 297 Ky. 553, 180 S.W.2d 303 (1944) (maintenance of public parks); Small v. City of Frankfort, 203 Ky. 188, 261 S.W. 1111 (1924), City of Louisville v. Bridwell, 150 Ky. 589, 150 S.W. 672 (1912), Davis v. City of Lebanon, 108 Ky. 688, 57 S.W. 471 (1900), Greenwood v. City of Louisville, 76 Ky. (13 Bush) 226 (1877) (operation of a fire department); Hagan v. City of Owensboro, 271 S.W.2d 904 (Ky. 1954), City of Louisville v. Hehmann, 161 Ky. 523, 171 S.W. 165 (1914) (collection of garbage); Having v. City of Covington, 25 Ky. L. Rptr. 1617, 78 S.W. 431 (1904), City of Paducah v. Allen 111

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In 1964, in *Haney v. City of Lexington*,¹⁰ the Court followed the lead of the Florida court which had repudiated, to a great extent, the doctrine of municipal immunity in *Hargrove v. Town of Cocoa Beach*.¹¹ The Florida court examined the traditional bases and justifications for municipal immunity and found them inconsistent with the modern concept of municipal corporations.¹²

The Court noted in *Haney* that it had, in recent years, made a growing number of exceptions to the immunity rule and could no longer support the doctrine by logic, justice or experience.¹³ The Court found itself in agreement with the California court which three years earlier had stated: "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by force of inertia."¹⁴ In 1957 the Kentucky Court had looked at the municipal immunity doctrine in light of the *Hargrove* decision, and concluded that although change was desirable, it was a matter of legislative discretion and the Court would have to content itself with criticism of the rule.¹⁵ In *Haney*, the Court stated that this position had been

(Footnote continued from preceding page)

Ky. 361, 63 S.W. 980 (1901) (operation of a pest house, but city is *liable* if it maintains any public institution classified as a nuisance); *Browder v. City of Henderson*, 182 Ky. 771, 207 S.W. 479 (1919) (operation of a city hospital); *White v. City of Hopkinsville*, 222 Ky. 664, 1 S.W.2d 1068 (1928), *Braunstein v. City of Louisville*, 146 Ky. 777, 143 S.W. 372 (1912) (operation of a city rock quarry); *Clark v. City of Nicholasville*, 120 Ky. 574, 87 S.W. 300 (1905), *Ernst v. City of West Covington*, 116 Ky. 850, 76 S.W. 1089 (1903) (school districts allowed to claim municipal immunity); *Duncan v. Brothers*, 344 S.W.2d 398 (Ky. 1961), *McCray v. City of Louisville*, 332 S.W.2d 837 (Ky. 1960) (false arrest and imprisonment); *Allison v. Cash*, 143 Ky. 679, 137 S.W. 245 (1911) (public health board); *Leavell v. Western Ky. Asylum for the Insane*, 122 Ky. 213, 91 S.W. 671 (1906) (operation of an insane asylum); *Williamson v. Louisville Indus. School of Reform*, 95 Ky. 251, 24 S.W. 1065 (1894) (operation of a reform school); *City of Bowling Green v. Rogers* 142 Ky. 558, 134 S.W. 921 (1911) (operation of city jail); *City of Louisville v. Carter*, 142 Ky. 60, 133 S.W. 985 (1911), *Maydwell v. City of Louisville*, 116 Ky. 885, 76 S.W. 1091 (1903) (sprinkling city streets); *Cleveland Wrecking Co. v. F. Struck Const. Co.*, 41 F. Supp. 70 (W.D. Ky. 1942) (municipal immunity extended to deliberate as well as negligent torts).

¹⁰ 386 S.W.2d 738 (Ky. 1964).

¹¹ 96 So.2d 130 (Fla. 1957).

¹² In looking at the rule of municipal immunity from tort liability, the Florida court described its objections:

The immunity theory has been . . . supported with the idea that it is better for an individual to suffer a grievous wrong than to impose liability on the people vicariously through their government. If there is anything more a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported. *Id.* at 132.

¹³ 386 S.W.2d at 739.

¹⁴ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, —, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).

¹⁵ *V. T. C. Lines, Inc. v. City of Harlan*, 313 S.W.2d 573 (Ky. 1957).

incorrect; and that indeed it was the duty of the Court to correct an unjust rule which had been judicially created.¹⁶ The new doctrine thus stated was that the rule is liability and the exception immunity,¹⁷ basically a reversal of the traditional position. The Court noted, however, that this decision did not impose liability on a municipality in the exercise of its legislative or judicial, or quasi-legislative or quasi-judicial functions.¹⁸

In repudiating the doctrine of municipal immunity from tort liability, the Court placed itself among at least a dozen states which have judicially abrogated, in varying degrees, the municipal immunity rule.¹⁹

The Court has applied the rule of the *Haney* decision a number of times since its inception,²⁰ but *Louisville Seed Co.* is the first major re-examination of the rule. In the instant case the Court finds it necessary to go beyond the broad repudiation of municipal immunity found in *Haney* and determine more specifically the limits of actions that will be permitted against municipalities.

The Court begins in *Louisville Seed Co.* with the premise that, "It is immediately recognized that there must be some limitations [in holding municipal corporations liable],"²¹ considering the wide scope of activities in which a municipality is engaged. The Court attempts to reach some middle ground which will protect both the individual and society, *i.e.*, the municipal corporations.²² In looking at leading decisions from two other jurisdictions facing a similar pro-

¹⁶ 386 S.W.2d at 741.

¹⁷ *Id.* at 740.

¹⁸ *Id.*

¹⁹ *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962) (applying Oregon court's construction of Oregon statutes which were applied to Alaska by Congress in 1884); *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959); *Gorman v. Adams*, 259 Iowa 75, 143 N.W.2d 648 (1966) (limited doctrine in that governmental function no longer raises presumption of immunity); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960) (municipality liable for negligent acts of commission); *Kelso v. City of Tacoma*, 63 Wash. 912, 390 P.2d 2 (1964) (municipal corporation does not retain immunity when state has enacted statute wherein state is subject to suit); *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

²⁰ *City of Louisville v. Chapman*, 413 S.W.2d 74 (Ky. 1967) (liable for negligent acts of police in auto wreck between police car and car of private person); *Stephenson v. Louisville & Jefferson Co. Bd. of Health*, 389 S.W.2d 637 (Ky. 1965) (board of health can no longer claim municipal immunity); *Burton v. Somerset City Hosp.*, 388 S.W.2d 135 (Ky. 1965) (city operated hospital not immune from liability).

²¹ 433 S.W.2d at 641.

²² *Id.*

blem,²³ and at the basic purposes of tort liability,²⁴ the Court concluded that the most equitable middle ground lay in analogizing tort situations between municipalities and individuals with ordinary tort actions between private persons, holding the municipality liable in those situations where it acts like a private person and where a private person would be liable.²⁵ The Court noted that preceding opinions had, in effect, applied this standard without identifying it as such.²⁶ The Court apparently believes that justice can best be achieved for both the municipal corporation and the individual by use of this rule—that a city should not be held liable for performing a function in which a private person does not naturally engage, *i.e.*, one which is inherently a function of government (*e.g.*, fire and police protection or flood control), and where the city does not single out or deal with the individual on an individual basis but is dealing with all of the general public alike.²⁷ The situation in *Louisville Seed Co.* falls directly within this classification according to the Court—flood control being an inherent function of government and the injured party not having been dealt with on an individual basis nor having had its loss isolated from that of the general public.²⁸

The Court was certainly justified in adding this further construction to the rule it first set out in *Haney*, but this new position does raise a number of questions. In the instant case the Court notes, "It is difficult to perceive how the cause of justice can be advanced by turning back the pages of history."²⁹ The Court did not actually, "turn back any pages"—it certainly did not go as far as the City of Louisville requested by reverting to the pre-*Haney* rule—but neither did the Court, in *Louisville Seed Co.*, move forward toward making municipalities more liable for the wrongs that they commit. This decision could in fact be viewed as a move back toward the pre-*Haney* era of increased municipal immunity. One could very well replace, "ultimate function of government," "risk which is inherently part of the carrying on of the function of government," and "act [affecting] all members of the

²³ *Steinhardt v. Town of North Bay Village*, 132 So. 2d 764 (Fla. 1961); *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 704 (1945).

²⁴ "[I]ts purpose is to compensate the injured, to spread the loss and to deter others from committing like wrongs." 433 S.W.2d at 642.

²⁵ *Id.* at 643.

²⁶ *City of Louisville v. Chapman*, 413 S.W.2d 74 (Ky. 1967) (City was operating a motor vehicle); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964) (City was operating a swimming pool, maintaining property as a private citizen would).

²⁷ 433 S.W.2d at 643.

²⁸ *Id.*

²⁹ *Id.* at 640.

general public alike,"³⁰ with the term *governmental function*, and replace "activities [which seek out or separate] the individual from the general public and [deal] with him on an individual basis,"³¹ with *proprietary function*, and the state of the law would be virtually back to where it was prior to *Haney*. Judging from the tenor of the opinion here, the Court has no intention of taking this step backward, but the classifications which have been set up easily lend themselves to such a move.

The Court also seems to have slipped into a "parade of horrors" type of justification in this decision in noting the "crushing burden"³² that could be imposed on a city through flood damage or fire damage for which it might be held liable. But the Court fails to give any factual historical example where such a burden was actually imposed on a municipal corporation or would have been imposed without the safeguard of immunity. This justification for municipal immunity has been questioned before and found somewhat lacking in support.³³ It seems highly doubtful that in modern times a truly "crushing burden" would ever be imposed on a municipality. With today's modern buildings and modern fire-fighting equipment and methods, it is doubtful that a municipal fire department would be so negligent as to cause damages which would bankrupt a city. It's hard to believe that Mrs. O'Leary's cow could succeed in burning down Chicago today—even if that city's fire department were *grossly* negligent. As far as flood damage is concerned, a city would of course be held liable only for those floods which could reasonably be foreseen, and one must question whether a city's negligent failure to protect against such a flood would cause the widespread damage intimated by the court. If we are concerned with justice in our legal system, that concern would not appear to be fostered by a policy that provides an individual with no legal remedy for the results of a city's negligent failure to provide adequate fire protection, or to properly install flood gates, or to provide other services which citizens rightfully rely on, whether they be inherent functions of government or not.

The major question thus raised by this decision is just how far has the Court come in abrogating the doctrine of municipal immunity from tort liability? One might view *Haney* as a giant step forward and

³⁰ All of these phrases were used in *Louisville Seed Co.* to describe areas in which the city *would not* be held liable. *Id.* at 642.

³¹ This phrase was used in *Louisville Seed Co.* to describe areas in which a municipality *would* be held liable. *Id.*

³² *Id.* at 643.

³³ See, e.g., Alostynte, *supra* note 3, at 510; Fuller & Casner, *supra* note 3, at 461.

Louisville Seed Co. as a small step backward; but regardless of this and of some apparent inconsistencies and questionable conclusions in the instant case, the Court has developed a more workable and just system of dealing with tort actions against municipal corporations than had previously existed under the old tradition based on the governmental-proprietary distinction. What the Court will do with the *Louisville Seed Co.* test will of course have to wait until another opportunity to rule in this area arises. It appears, however, that although the court stated in *Haney* and reiterated in *Louisville Seed Co.*, that it was the duty of the Court to correct an unjust rule which had been judicially created,³⁴ it is prepared to go no further in repudiating the rule of municipal immunity than it has gone in the instant case. The Court is thus, intentionally or by inference, leaving any further change in the rule to the province of the legislature where it more properly belongs. The legislature can best provide the consistency and uniformity sorely needed in this area by the depth study and consideration of some of the overall problems dealing with effective deterrence of negligent acts, creation of effective risk-spreading devices such as municipal or private liability insurance, and identification of those municipal functions which require complete immunity from private interference through damage liability claims. A problem of these dimensions requires a comprehensive legislative solution rather than an uncertain rule of law derived piecemeal from various court decisions.

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³⁴ 386 S.W.2d at 741.